NO. 80-6505

IN THE

SUPREME COURT OF THE UNITED STATES

80-6506

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

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SON H. FLEMING,

Petitioner,

v.

SAM AUSTIN,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

BRIEF ON BEHALF OF THE RESPONDENT

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QUESTIONS PRESENTED

1.

Did the fact Petitioner did not fire the fatal shot render his death penalty disproportionate?

2.

Did the trial court correctly charge the jury concerning mitigating circumstances at Petitioner's second sentencing trial?

3.

Was the imposition of the death penalty at Petitioner's second sentencing trial constitutional?

4.

Did any constitutional error occur at Petitioner's committal hearing?

5.

Was the testimony of Ira Bass admissible?

6.

If Petitioner never exercised his Fifth Amendment right, was there any improper argument or questioning concerning his various statements?

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BRIEF ON BEHALF OF THE RESPONDENT

STATEMENT OF THE CASE

Farrell Kent, the owner of the Adel grocery store in Cook County, Georgia, was robbed by two men about 10:00 or 10:30 p.m. on February 11, 1976. (T. 183). One man had a nickel-plated .22 caliber pistol and the other man wore a dark ski mask which he later pulled up, revealing his face. (T. 184-185). Kent identified the two men as Larry Donnell Fleming and Henry Willis. (T. 187). The men stuffed money in a paper sack and also took a carton of Kool cigarettes. (T. 183, 189).

Mr. L. V. Dupree was chatting with Police Chief James E. Giddens in Ray City when a report came in on Giddens' radio that an armed robbery had just occurred in Adel. (T. 205-206). Giddens was due to retire the next day, February 12. (T. 154). A car passed with two visible black males,

one wearing some sort of cap; Giddens said he would check it out and be right back and then drove east in pursuit of the car. (T. 206).

A dispatcher at the police station got a call from Giddens reporting that he was stopping a red and white Ford, tag number GBO 282. (T. 218). This was Giddens' last communication. (T. 219). Meanwhile, Dupree waited for Giddens' return and then drove in the direction Giddens had taken. (T. 208). Less than a mile away, Dupree found Giddens' police car empty with the motor and the lights off. (T. 208, 211). A shotgun lay near the car. (T. 211).

Alerted on police car radios about Giddens' disappearance, several law enforcement officers joined the lookout for the red Ford. (T. 225, 243, 255, 276, 282). A car fitting the description was stopped in Brooks County by two deputies about 12:30 a.m. (T. 256, 257-258). The deputies, Willie Jones and Thomas Weaver, had the three occupants emerge and then searched the car. (T. 259-262, 284). Petitioner Son Fleming was identified as one of the three occupants. (T. 269, 284). A .357 magnum revolver, a nickel plated .22 revolver and a brown sack containing bills was found in the car. (T. 265, 266). It was discovered later that the .357 magnum had belonged to Giddens. (T. 156, 281, 293). A carton of Kool cigarettes was also found in the car. (T. 408).

Giddens' uniform shirt was discovered several hours later in Lanier County near Lakeland, Georgia, off the side of a road; Giddens' body was found in a nearby pond. (T. 298. 303).

An autopsy showed that Giddens had been shot several times. A .38 bullet had entered the left abdomen, exited and then entered the right arm. (T. 382-383). There were three gunshot wounds to his head, one each in his left and

right temple areas and one in his forehead between the eyes. (T. 372, 375-376). There was also an entry wound in the cheek which paired with an exit wound in the neck. (T. 376, 380). There were wads of ratshot beneath the forehead and temple wounds, and the left temple wound had penetrated the skull and brain. (T. 380, 381). Dr. James Dawson of the State Crime Lab, who performed the autopsy, believed that the bullet from this wound had entered the nasal cavity into the mouth and fell from or was spit from the mouth of the victim. (T. 390-391). The powder burns on the victim indicated that the weapon or weapons had been fired at a distance of 18 inches or less from Giddens' body. (T. 373, 386).

Crime Lab tests by a microanalyst revealed that the .38 bullet in the victim's arm and a .38 bullet found in a tree near the pond had been fired from Giddens' .357 magnum. (T. 397, 398). Further tests also showed that the patterns of ratshot and powder burns on the victim's head had been caused by the .22 pistol fired 18 inches or less away from the victim. (T. 400-401).

Further State testimony connected Petitioner with the events surrounding the murder. Terry Coney testified that Petitioner borrowed his 1969 red Ford on February 11 and had not returned it by the next morning. (T. 162, 164, 170). King West, Petitioner's uncle, received a visit from Petitioner about midnight on February 11. (T. 233). Petitioner told West that he had gotten wet and needed dry clothes, but West refused Petitioner's request and Petitioner left. (T. 235).

After Petitioner was found in the red Ford on February 12 and arrested, he made various statements to law enforcement officials. On February 12, Appellant told Detective Captain Billy Register of Valdosta that he was not with Larry Fleming or Henry Willis during the armed robbery or murder. (T. 317).

Petitioner claimed he was picked up by them just prior to the arrest. (T. 317). Petitioner told Register that he had been with a Robert Hall and a Turpentine Slim on February 11, and had also visited his uncle, King West. (T. 318). Investigating Petitioner's alibi, Register learned that Turpentine Slim didn't know Petitioner and that Hall had been in Florida for three years. (T. 319, 320). West told Register that Petitioner stopped by the night of February 11 to get clothes for someone named Larry who had fallen in a creek getting water for an overheated car. (T. 319).

On February 15, Petitioner signed a waiver of rights and made an exculpatory statement. (T. 415-17, 428).

On February 16, Petitioner made a statement in which he admitted to being with Larry Fleming and Henry Willis when Giddens stopped their car. (T. 321. 337). Petitioner, who was driving, showed his driver's license, then Giddens attempted to search the car. (T. 337, 338). Willis and Larry Fleming, Petitioner's nephew, grabbed Giddens and a struggle ensued. (T. 338-339). Larry Fleming then forced Petitioner to drive away while he and Willis each held guns on Giddens. (T. 340, 341). After Giddens told them he had called in their tag number, they let Giddens out. (T. 341-342). As Giddens ran, Larry Fleming shot him four times with the .357 and Willis fired a .22 revolver. (T. 342). Giddens fell into a pond crying, "I'm hit" and Willis and Larry Fleming followed him there. (T. 343). Petitioner claimed he heard the .22 pistol being fired. (T. 343). According to Petitioner, he was unaware of the robbery in Adel, and did not participate in Giddens' murder. (T. 348, 353). Petitioner stated he did what Willis told him because he was afraid of Willis and his nephew. (T. 321, 350).

Sheriff D. H. Alderman of Colquitt County who had known Petitioner all his life, talked to Petitioner on the 16th after advising him of his rights. (T. 431). Petitioner told Alderman that when Giddens found a bag of money in the Ford, Willis and Larry Fleming jumped Giddens and kidnapped him. (T. 432). Petitioner claimed he begged the two men not to kill Giddens, but they disregarded the advice. (T. 432).

Following a Jackson-Denno hearing on Petitioner's statements, the Court ruled that they were made voluntarily. (T. 439). The testimony regarding the statements was repeated in abbreviated form for the jury. (T. 446-449, 455-459, 461).

In addition to Petitioner's statements, the State offered the testimony of Ira Bass who was in the Cook County Jail with Petitioner on February 15. (T. 465). Bass testified that Petitioner admitted he drove a car to a store which Willis and Larry Fleming robbed. (T. 466-467). Later, when a policeman stopped their car, all three men, including Petitioner, struggled with the police officer and successfully took away his gun. (T. 467). Petitioner drove several miles; then they stopped and got out. (T. 467). When Giddens tried to run away, Petitioner took the .357 gun from his nephew and shot Giddens as he ran into the water. (T. 467-468). Petitioner's nephew and Willis then waded into the pond and shot the victim again. (T. 468). Petitioner drove to Valdosta and unsuccessfully requested dry clothes from his uncle. (T. 468). 1/

Petitioner's sole defense was his own testimony. Petitioner claimed that on February 11, he visited a Joe Binghamton after borrowing Coney's Ford. (T. 490, 492). Larry Fleming and his friend, Henry Willis, then borrowed the Ford from Petitioner. (T. 492). According to Petitioner, when he saw the two men later, they would not say where they had been. (T. 493). Petitioner's nephew needed dry clothes, so Petitioner drove

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1/ At his trial Henry Willis testified that Son Fleming drove the getaway car, decided what place would be robbed, helped overpower Giddens, and shot Giddens with the .357 magnum. (Willis T.T. 593-97). Willis testified he shot Giddens three

(cont.)

to his uncle's house to get some. (T. 493). Petitioner claimed that West did give him some clothes. (T. 493). On their return to Moultrie, two police officers stopped them and they were subsequently arrested. (T. 494). Petitioner denied that he had made any statement to Ira Bass regarding his complicity in a robbery or murder. (T. 495).

Petitioner was originally tried in January, 1977, found guilty of murder, and received the death penalty. However, his death penalty was vacated by the Georgia Supreme Court. Fleming v. State, 240 Ga. 142, 240 S.E.2d 828 (1977). He had a new sentencing trial and again received the death penalty. Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979), cert. denied, 444 U.S. 885 (1979).

In State habeas, Petitioner voluntarily dismissed his first petition prior to the scheduled hearing, thus effectively delaying State proceedings. At the hearing on the second petition, Petitioner's sole evidence was the brief filed on his first direct appeal.

Petitioner was denied State habeas relief by the Supreme Court of Tattnall County, and the Georgia Supreme Court denied a certificate of probable cause to appeal.

1/ (cont.)
times and Larry Fleming shot Giddens while Giddens was lying in the water. (Willis T.T. 598-99). However, in a previous statement to police, Willis said Larry Fleming had not shot Giddens. (Willis T.T. 350).

REASONS FOR NOT GRANTING THE WRIT

A. THE FACT PETITIONER DID NOT FIRE THE FATAL SHOT DOES NOT RENDER HIS DEATH PENALTY DISPROPORTIONATE.

Petitioner's novel premise is that if the State's evidence is disregarded and his self-serving testimony is accepted as true, the evidence fails to show Petitioner intended the death of the victim. However, conflicts in the evidence must be resolved in favor of the prosecution. Jackson v. Virginia, 443 U.S. 307, 326 (1979). The State's evidence showed that Petitioner shot and wounded the victim with a .357 magnum. Then Petitioner stood by while Henry Willis waded into the water and fired the fatal shots while the victim was lying helpless in the water.

The State's evidence shows that Petitioner shot the victim and intended his death. In Lockett v. Ohio, 438 U.S. 586 (1978), the accused was outside the pawnshop and in the getaway car when the fatal shot was fired. Therefore, Petitioner's case simply does not present the issue of the co-felon which the State's evidence showed did not intend the death of the victim.

B. THE TRIAL COURT CORRECTLY CHARGED THE JURY CONCERNING MITIGATING CIRCUMSTANCES AT PETITIONER'S SECOND SENTENCING TRIAL.

In his charge to the jury at the second sentencing trial the trial judge stated that the jury was authorized to consider all the facts and circumstances of the case. (Second T. 484). Mitigating circumstances did not constitute a justification for the crime but might be considered as extenuating or reducing the degree of moral culpability or blame. (Second T. 484). The jury was authorized to consider evidence as to the mitigating

circumstances Petitioner contended that existed in the case. (Second T. 486). The jury was also authorized to recommend a life sentence with or without a reason or for any reason that was satisfactory to the jury. (Second T.T. 486).

Since the jury was instructed they could impose a life sentence even if no mitigating circumstances existed, the jury was not precluded from considering any circumstance which Petitioner proffered as a basis for a sentence less than death. See Lockett v. Ohio, 438 U.S. 586, 604 (1978). There were no objections to the trial judge's charge, and there was no error concerning mitigating circumstances.

C. THE IMPOSITION OF THE DEATH PENALTY AT PETITIONER'S SECOND SENTENCING TRIAL WAS CONSTITUTIONAL.

At Petitioner's second trial the jury found two aggravating circumstances: the murder was committed against a peace officer in the performance of his duties, Ga. Code Ann. § 27-2534.1(b)(8); and the murder was committed while Petitioner was engaged in the capital felony of kidnapping with bodily injury. Ga. Code Ann. § 27-2534.1(b)(2). Therefore, Godfrey v. Georgia, ___ U.S. ___,64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) is inapplicable as that decision dealt with a case having as its sole aggravating circumstance that set forth in Ga. Code Ann. § 27-2534.1(b)(7). 2/

At Petitioner's trial the jury was charged that before the death penalty would be authorized, there had to exist an aggravating circumstance. (Second T.T. 484). However, even if the State proved beyond a reasonable doubt that an

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2/"The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

aggravating circumstance existed, the jury still was not required to impose the death penalty. (Second T.T. 486). Therefore, the jury had its discretion guided concerning imposition of the death penalty. See Gregg v. Georgia, 428 U.S. 153 (1976).

Although Henry Willis, who fired the fatal shots and received the death penalty, Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979); cert. denied 444 U.S. 885 (1979), Larry Fleming did not. [3/] What Petitioner failed to mention in his brief was that the State could produce no evidence that Larry Fleming ever shot the victim. The State's evidence at Petitioner's trial and Willis' own testimony at his trial proved that Petitioner and Willis shot the victim. The only statement Larry Fleming shot the victim came from Willis, who had given a prior inconsistent statement. At his trial Larry Fleming testified that only Petitioner and Willis shot the victim, and Willis took the Fifth Amendment at Larry Fleming's trial.

D. NO CONSTITUTIONAL ERROR OCCURRED AT PETITIONER'S COMMITTAL HEARING.

Although Attorney Edward Parrish had not yet been appointed to represent Petitioner, Parrish was present at the committal hearing to hear testimony. (T. T. 333). There is no evidence Petitioner testified or gave any statement at the committal hearing. At the State habeas hearing Petitioner did not even tender the committal hearing transcript into evidence.

Petitioner had the burden of proof at his State habeas hearing, Walker v. Johnson, 312 U.S. 275, 286 (1941), yet he failed to produce any evidence as to what constitutional errors occurred at the committal hearing.

3/ Larry Fleming has not yet appealed to the Georgia Supreme Court.

E. THE TESTIMONY OF IRA BASS WAS ADMISSIBLE.

Petitioner was indicted July 15, 1976, and his attorney was appointed by the trial court August 24, 1976. [4/] Since Petitioner's conversation with Ira Bass occurred several months prior to indictment and appointment of counsel, the Sixth Amendment right to counsel did not attach. See United States v. Henry, ___ U.S. ___, 65 L.Ed.2d 115, 100 S.Ct. ___ (1980); Massiah v. United States, 377 U.S. 247 (1964). Therefore, the critical issue was whether or not Petitioner's statement to Bass was voluntary.

Bass was initially incarcerated on September 20, 1975, and charged with molestation of his stepchild. (Second T. 215, 298, 307). On February 9, 1975, he pled guilty to two counts of child molestation, and received a seven-year sentence, with four years to serve and the three-year balance probated. (Second T. 214).

Bass was in the Cook County jail on Friday, February 13, 1976, when Petitioner was placed there. (Second T. 281, 297). Petitioner initiated a conversation with Bass in which Petitioner admitted driving the getaway car during the robbery and shooting of Giddens. (Second T.T. 283-85). Bass apparently wrote a note to the Sheriff about Petitioner, but Bass testified that he did not talk to any law enforcement officers until after Petitioner told Bass what happened. (Second T. 294, 296-97).

Bass also testified that Petitioner made his statement on February 15, 1976, which was a Sunday, but that Bass talked with the Sheriff and GBI Agent Harold Greeson on Saturday

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4/ In its order the trial court found that Attorney Edward Parrish had already been investigating the case for several months and was familiar with the facts of the case.

afternoon, which would have been February 14, 1976 (Second T.T. 282, 288). Bass apparently was thinking that February 15, 1976, fell on a Saturday, for the testimony of GBI Agent Greeson established that the conversation with Bass occurred on February 15, 1976, at 5:30 p.m. (Second T.T. 315). Therefore, the statement of Petitioner to Bass occurred before Bass ever talked to law enforcement officers. Bass was not a government agent, his conversation with Petitioner was not a custodial interrogation, and Bass' testimony was properly admitted.

Prior to Petitioner's trial, State officers promised Bass that if he testified he would not be sent back to Reidsville, which is where Georgia's maximum security prison is located. (Second T.T. 295).

Prior to Petitioner's first trial in January, 1977, Bass had been incarcerated for sixteen months. (Second T.T. 215). Under Georgia's earned time law, which enables an inmate to earn a day off his sentence for every day of good behavior, Bass would have discharged from custody in two years, resulting in his release on September 20, 1977. See Ga. Code Ann. § 77-320.1.

After Bass testified in January, 1977, at the recommendation of the District Attorney, and sentencing judge, the State Parole Board reduced Petitioner's custodial sentence to February 9, 1977. (Second T.T. 195, 202). As a result of this action, Bass was released from custody seven-and-one-half months early.

There was no evidence that Bass was made any promises by the State concerning parole prior to Petitioner's first trial. At Petitioner's second trial the State placed in evidence all favorable action taken on Bass' behalf subsequent to Bass' original testimony. (Second T.T. 195, 202). Petitioner's

counsel had full opportunity to cross-examine Bass at the first trial and to cross-examine all witnesses concerning any favorable treatment of Bass.

There was no objection to the testimony of Bass, and no evidence was presented at the State habeas hearing to reflect that the State made a surreptitious promise of a shortened sentence prior to Petitioner's first trial.

F. SINCE PETITIONER NEVER EXERCISED HIS FIFTH AMENDMENT RIGHT, THERE WAS NO IMPROPER ARGUMENT OR QUESTIONING CONCERNING HIS VARIOUS STATEMENTS.

Whenever Petitioner was questioned by police officers, he gave statements, most of which were self serving. Petitioner originally told Detective Register that he was not with Willis and Larry Fleming during the commission of the armed robbery or murder; Petitioner alleged he had been with Robert Hall, and Turpentine Slim. (T.T. 317-18). On February 15, 1976, Petitioner gave an exculpatory statement to GBI Agent Greeson. (T.T. 415-17, 428). Then on February 16, 1976, Petitioner admitted driving the car and being with Willis and Larry Fleming during the murder and the kidnapping of the victim. (T. 321, 337-54). However, Petitioner said Willis and Larry Fleming at gunpoint forced Petitioner to remain at the scene. (T.T. 342). When officers asked Petitioner why he failed to make these facts known when he was stopped and first questioned by police, Petitioner replied he was frightened. (T.T. 346, 350).

At the guilt or innocence phase of his trial, Petitioner took the stand and testified that when he was initially arrested, [by Willie Jones and Thomas Weaver] Petitioner told the officers he did not know anything about a policeman. (T.T. 494).

There were Jackson v. Denno hearings at both the guilt phase of the trial and at Petitioner's second sentencing trial. (T.T. 313-356, 409-444; Second T.T. 229-48). At neither hearing did Petitioner take the stand to dispute law enforcement officers' testimony that the confession was knowingly and voluntarily given. However, in December, 1977, at the second sentencing trial Petitioner told the jury that Detective Register had beaten Petitioner. (Second T.T. 332).

In his closing argument the District Attorney argued that if Petitioner had truly been a coerced innocent bystander at the murder of Giddens, Petitioner would have said something to police when he was arrested. This argument was not a comment on Petitioner's exercise of his Fifth Amendment right as Petitioner never invoked his right to silence. The undisputed testimony is that Petitioner initially told police he knew nothing about the murder. It was only when Petitioner's alibi defense began to fall apart under the scrutiny of a police investigation that Petitioner admitted being present when the murder was committed but alleged he was a coerced innocent bystander. The District Attorney was entitled to argue all reasonable inferences to the jury, including the inference that an innocent bystander would have told the truth when he was arrested rather than lied. See United States v. Hager, 505 F.2d 737, 740 (8th Cir. 1974).

The trial court asked Petitioner why he had not mentioned the beating before and Petitioner said that he was scared. (Second T.T. 379-80). There is nothing unconstitutional about a judge's propounding questions to a witness. F.R.Evid. 614(b); see Moore v. United States, 598 F.2d 439, 442 (5th Cir. 1979).

Moreover, there was no objection at trial to the District Attorney's closing argument or the brief examination by the judge. Georgia law requires a contemporaneous objection, Hart v. State, 227 Ga. 171, 179 S.E.2d 346 (1971); and Petitioner's failure to make a timely objection precludes consideration in habeas corpus. See e.g. Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976).

CONCLUSION

For all the previously stated reasons, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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